

DOUGLAS H. WILLSON
W. G. BOONENBERG

(92 I.D. 153)

IBLA 84-605

Decided April 22, 1985

Appeal from a decision of the Utah State Office, Bureau of Land
Management, rejecting noncompetitive oil and gas lease offers U-52932,
U-52933, and U-53152.

Set aside and remanded.

1. Act of September 19, 1914--Mineral Leasing Act: Lands Subject to--Oil and Gas Leases:
Discretion to Lease--Oil and Gas Leases: Lands Subject to--Oil and Gas Leases: Offers to Lease

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Kenneth F. Cummings, 62 IBLA 206 (1982), overruled to the extent it is inconsistent.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Douglas H. Wilson and W. G. Boonenberg have appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated April 20, 1984, rejecting their noncompetitive oil and gas lease offers, U-52932, U-52933, and U-53152.

On April 12, 1983 (U-52932 and U-52933) and May 11, 1983 (U-53152), appellants filed noncompetitive oil and gas lease offers for 7,666.74 acres of land situated in Salt Lake County, Utah, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1982). By the Act of September 19, 1914, ch. 302, 38 Stat. 714, Congress provided that certain public lands, including the lands described in the offers, are "hereby reserved from all forms of location, entry, or appropriation, whether under the mineral or nonmineral land laws of the United States, and set aside as a municipal water supply reserve for the use and benefit of the city of Salt Lake City, a municipal corporation of the State of Utah."

By letter dated May 19, 1983, appellants notified the Forest Service, Department of Agriculture, which administers the land, that they would be willing to accept a no-surface-occupancy stipulation as a condition to leasing. The Regional Forester recommended to BLM, by letter dated April 10, 1984, that appellants' lease offers be rejected despite appellants' willingness to accept no-surface-occupancy stipulations. The Regional Forester stated that to recommend issuance of leases would be "unfair" to earlier lease offerors whose offers had been rejected on the basis that the land

was closed to leasing. In its April 1984 decision, BLM rejected appellants' lease offers because the lands are "within the Salt Lake City Municipal Watershed," which was withdrawn from appropriation under the public land laws, "including the mineral leasing laws," by the Act of September 19, 1914.

In their statement of reasons for appeal, appellants contend that the land involved herein was not withdrawn from mineral leasing by the Act of September 19, 1914, because such leasing does not constitute "location, entry, or appropriation" of the land, citing Noel Teuscher, 62 I.D. 210, 213 (1955), and Solicitor's Opinion, 48 L.D. 459, 462-63 (1921). Appellants also note that the Act of September 19, 1914, predated the authority for leasing minerals established by the Mineral Leasing Act of 1920, 41 Stat. 436, which was enacted almost 6 years later. Appellants urge the Board to overrule its previous decision in Kenneth F. Cummings, 62 IBLA 206 (1982), wherein we affirmed rejection of certain noncompetitive oil and gas lease offers in similar circumstances.

[1] In Kenneth F. Cummings, *supra* at 209, we specifically concluded that the Act of September 19, 1914, constitutes a "viable and effective statutory withdrawal of the land from the operation of any of the mineral or nonmineral laws of the United States relating to location, entry or disposition, including the mineral leasing laws." However, we are now persuaded that the Act did not *per se* withdraw the land from the operation of the mineral leasing laws, and to that extent, the Board's decision in Kenneth F. Cummings, *supra*, is overruled.

There is substantial precedent within the Department for distinguishing mineral leasing from location, entry, or selection under the public land laws, which latter terms describe acts which initiate the process of acquiring title to the land. Solicitor's Opinion, supra. As the Deputy Solicitor stated in Noel Teuscher, supra at 213: "An oil and gas lease is not an appropriation of the leased land in the sense that it sets the land apart from any other use. Such land is subject to other disposition both as to the surface and as to the other mineral deposits in the land." Thus, unless the withdrawal or reservation specifically provides otherwise, withdrawn or reserved land is presumed to be available for oil and gas leasing. TXO Production Corp., 79 IBLA 81, 83-84 (1984); Douglas E. Smith, 69 IBLA 343 (1982); Esdras K. Hartley, 54 IBLA 38, 88 I.D. 437 (1981). However, "leases will not be issued where the mineral development of the land might seriously impair or destroy the purpose for which the lands have been dedicated." Noel Teuscher, supra at 213, and cases cited therein.

In the present case, the Act of September 19, 1914, reserves the land "from all forms of location, entry, or appropriation, whether under the mineral or nonmineral land laws." An oil and gas lease is considered neither a "location, entry, or appropriation" under the Act. Solicitor's Opinion, supra at 462-63; Noel Teuscher, supra. Moreover, the Act does not specifically preclude mineral leasing. Indeed, the Act could not have made such a reference because Congress did not provide for mineral leasing until enactment of the Mineral Leasing Act on February 25, 1920. Therefore, we conclude that oil and gas leasing of land within the Salt Lake City municipal watershed is not precluded by the Act itself. However, this is not to say that leasing

is required or that BLM does not have the authority to deny issuance of the oil and gas leases.

Prior to leasing, BLM must determine whether leasing would be inconsistent with or materially interfere with the purposes for which the land is reserved, in accordance with BLM's discretionary authority under section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), in order to decide whether to permit leasing and under what terms and conditions. Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1965); Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969); Haley v. Seaton, 281 F.2d 620, 624-25 (D.C. Cir. 1960); Esdras K. Hartley, supra. In making this determination, BLM should consider the views of Salt Lake City and the Forest Service. 1/ BLM should, especially, consider leasing subject to a no-surface-occupancy stipulation. 2/ The paramount concern, as expressed in section 2 of the Act of September 19, 1914, 38 Stat. 715, is that BLM must do nothing which would

1/ The April 1984 letter from the Regional Forester indicates that the Forest Service might recommend issuance of leases, especially given appellants' willingness to accept a no-surface-occupancy stipulation, but for its concern for fairness to prior offerors. On remand, BLM should afford the Forest Service an opportunity to express its views in light of the present holding that oil and gas leasing is not precluded by the Act of Sept. 19, 1914.

The record also does not contain any expression of the city's current views on the subject of leasing, especially given imposition of a no-surface-occupancy stipulation. We note that the city filed a statement in connection with its intervention in Cummings, which argued that mineral development of the land would damage the municipal watershed. However, we also note appellants' evidence that tracts owned by Salt Lake City in close proximity to the withdrawn lands embraced in the lease offers are currently subject to oil and gas leases issued by the City.

2/ We note that leasing, even with a no-surface-occupancy stipulation, may pose an unacceptable risk of damage to the municipal watershed, either through subsidence, fracturing of the underlying strata, or other means. In such circumstances, BLM could properly refuse to issue an oil and gas lease.

materially interfere with the purposes of the reservation, i.e., "storing, conserving, and protecting from pollution the said water supply, and preserving, improving, and increasing the timber growth on said lands to more fully accomplish such purposes," or the city's right to "the use of any and all parts of the lands reserved, for the storage and conveying of water and construction and maintenance thereon of all improvements for such purposes."

We, therefore, conclude that BLM improperly rejected appellants' lease offers solely on the basis that the land was withdrawn from mineral leasing. The April 1984, BLM decision is set aside and the case remanded to BLM to determine whether to permit leasing and, if so, under what terms and conditions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James L. Burski
Administrative Judge.

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

As the author of the Board's opinion in Kenneth F. Cummings, 62 IBLA 206 (1982), which we now overrule in part, I wish to add a few words in further analysis of the matter.

In the instant case Judge Grant quite properly cites Noel Teuscher, 62 I.D. 210 (1955), and Solicitor's Opinion, 48 L.D. 459 (1921), to define "entry," "appropriation," and "location" and to establish that mineral leasing does not fall within the scope of those terms as defined by those authorities. However, neither in Teuscher nor Solicitor's Opinion did the language of the orders of withdrawal make any reference whatever to the mineral laws of the United States. By contrast, the Act of September 19, 1914 (38 Stat. 714), with which we are here concerned, expressly provides that the lands "are hereby reserved from all forms of location, entry, or appropriation, whether under the mineral or nonmineral land laws of the United States * * *." (Emphasis added.) There can be no question that at the time of its enactment this statute constituted a total withdrawal of the land, and that Congress so intended. Likewise, there can be no question that the Mineral Leasing Act of 1920, enacted less than six years later, must be considered to be one of the "mineral laws of the United States." Looking again at the language of the 1914 Act, we must wonder whether the prohibition against "all forms of * * * entry" was intended to encompass any sort of physical entry or ingress upon the land, as opposed to the more limited definition of "entry" which contemplates only the taking of possession of the land under authority of one of the statutes which provide for eventual alienation of the Federal

title. The answer, I believe, lies in the application of the rule of ejusdem generis. In the 1914 Act the word "entry" appears in association with the words "location" and "appropriation," both of which, in public lands parlance, connote the lawful taking of possession preliminary to the acquisition of title. Thus, the word "entry" cannot be given its broadest meaning, but must be limited to comport with the meanings of the other words with which it is associated. Noscitur a sociis.

Accordingly, I now agree that although the Mineral Leasing Act of 1920 is a mineral law of the United States, the interests which can be created under that statute are not of the type proscribed by the 1914 Act, and I can only extend my apology to Mr. Cummings for my error in his case.

Edward W. Stuebing
Administrative Judge.

